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Testimony Before the U.S. House of Representatives
Subcommittee on Water and Power

Field Hearing On:
"Evaporating Prosperity: How Federal Actions Are Driving Up Water and Power Costs, Threatening Jobs and Leaving Arizonans High and Dry"

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My name is Gregory Mendoza and I am Governor of the Gila River Indian Community. The Community is an Indian Nation located south of Phoenix, Arizona, encompassing 372,000 acres and with over 20,000 tribal members. On behalf of the Community, I want to thank the Subcommittee for its continued interest in this issue that could have a very profound effect on all water users in the State of Arizona. In particular, I want to thank the members of the Arizona delegation for their support and efforts to have Congress take an active oversight role to ensure that the detrimental effects of the proposed environmental measures for the Navajo Generating Station (NGS) are taken into account by the EPA before it seeks to implement them.

The Community last testified on this matter on May 24, 2011, at which time we informed the Subcommittee that the Community agreed to settle its water rights claims based upon the promise that affordable Central Arizona Project (CAP) water would be available to the Community on a long term basis. Congressional approval of the Arizona Water Settlements Act of 2004 (AWSA) codified that promise and made the Community the largest customer of CAP water in the State of Arizona. Because of this promise, the EPA's decision must be consistent with the legal rights granted under AWSA, and the United States, including the EPA, must uphold its trust obligation to ensure the Community's access to affordable annual deliveries of CAP water.

In our May 24, 2011, testimony the Community conveyed its concerns about the potentially catastrophic consequences for Arizona Indian tribes, especially for the Community, that could occur if EPA requires Selective Catalytic Reduction (SCR) as the Best Available Retrofit Technology (BART) for NGS. EPA's BART determination for NGS has the potential – unlike any other Clean Air Act determination that we are aware of – to profoundly affect the economy and culture of the Community and all other similarly situated Arizona tribes with water rights settlements, the United States' trust responsibility to these tribes, and rights specifically bargained for and granted in Federal legislation.

Since the Subcommittee's May 24, 2011, hearing the Community has been actively engaged with the EPA, the Department of Interior (DOI) and the Department of Energy (DOE) to express the Community's concerns in a government-to-government capacity, provide data regarding the economic impact of different BART scenarios, and offer possible solutions to mitigate the

negative impacts of BART on CAP settling tribes. Further, during the later part of 2011 DOI and DOE collaborated in a report conducted by the National Renewable Energy Laboratory (NREL). The NREL report was intended to inform EPA of the impacts of the different BART scenarios. As part of this study NREL gathered data from Arizona tribes to determine the impact on tribal economies.

In an effort to better inform NREL, DOI and EPA the Community engaged Harvey Economics to determine the economic impact the different BART scenarios would have on the Community. The Harvey Economics study confirmed the Community's fears that BART, without a mitigation plan, would devastate the Community's agricultural economy and undermine the carefully balanced water settlement in AWSA.

The NREL and Harvey Economics study confirmed that BART could have a profound negative impact on tribal economies in Arizona. Moreover, during the Community's consultation sessions with DOI and EPA, both acknowledged that NGS is unlike any other electrical generating facility in the Southwest because of its importance to many tribal economies. In our opinion this acknowledgement by DOI and EPA requires that any proposal to ensure visibility in our national parks and wilderness areas include a pragmatic plan to mitigate the negative impact BART would have on tribal economies. Indeed, in Administrator Lisa Jackson's February 16, 2012, letters to Secretary Salazar and Secretary Chu, the EPA expressed a desire to find a creative solution with respect to BART at NGS.[1]

The Community has been encouraged by the engagement and support it has had from the DOI in particular, and heartened by the Federal acknowledgement that NGS was unique and needed a creative solution. In response to this news the Community began to explore a possible mitigation plan that would allow NGS to stay open, meet Clean Air Act standards for haze in the northern Arizona region and lessen the impact of BART on CAP settling tribes. This plan was shared with DOI, EPA and DOE officials in March and April 2012 and will be discussed below.

1. BART's Economic Impact on the Community

When I took office I also took on a solemn trust to protect the water rights for which we had fought so long to obtain. From the beginning of time, the entire life and identify of our people, the Akimel O'otham or the "River People," involved the Gila River. We drank from the river, irrigated our farms, fished for food and depended on the River for many spiritual ceremonies. At the beginning of the 1900's, farmers upstream of from our lands diverted nearly all the water from the Gila River, depriving the Community of water to support the Community's agricultural economy, and causing dramatic and detrimental changes to our diet, lifestyle, economy, culture and spiritual well-being.

The Community began fighting for its water rights in the early 1930's, and finally in 2004 Congress approved the Community's settlement of its claims to water. This settlement was at the time the largest Indian water rights settlement in United States history. The Community's settlement was enacted as law in the AWSA. In the settlement approved in the AWSA, the

[1] Attachment 1, February 16, 2012 letters from EPA Administrator Lisa Jackson to Secretary of Interior Kenneth Salazar and Secretary of Energy Dr. Steven Chu.

Community agreed to waive its claims to additional water from the Gila River in exchange for the promise of long-term affordable CAP water. The use of CAP water to fulfill the entitlements of the Community to Gila River water is an essential component its settlement.

The Community's settlement allocates 311,800 acre feet of CAP water to the Community each year, making the Community the single largest CAP contractor. The Community's settlement, through the AWSA, also provides funds to subsidize the costs of delivering CAP water to the Community, and to construct, operate and maintain the facilities necessary to allow the Community to fully utilize our allocated water. The AWSA's funding mechanism is a fund, entitled the Lower Colorado River Basin Development Fund (Development Fund), which pays "annually the fixed operation, maintenance, and replacement charges associated with the delivery of [CAP] water held under long-term contracts for use by Arizona Indian tribes." One of the sources of revenue for the Development Fund to pay these costs for CAP settling tribes is the sale of surplus power generated from NGS.

NGS supplies approximately 95% of the power to deliver the CAP water to the Community and other CAP customers. Requiring NGS to install and operate SCR technology as BART will both significantly increase the cost of CAP water and decrease the future revenue generated for the Development Fund. These two impacts will substantially undermine the benefits that the Community specifically bargained for and relied upon in agreeing to settle our water claims and claims against the United States.

In an effort to determine how the different BART scenarios would impact the cost of CAP water the Community hired Harvey Economics in August 2011 to complete an economic impact study. Harvey Economics looked at different BART which included Low Nox Burners (LNB), Selective Non-Catalytic Reduction (SNCR), SCR, SCR plus Baghouses, and NGS closure. On November 16, 2011, Harvey Economics completed draft findings related to the possible BART scenarios.[2] The draft report was based on the information about BART technologies available at the time. Harvey Economics updated its report on February 28, 2012.[3] On March 15, 2012, Harvey Economics provided another update to its report that included revised assumptions provided by the NGS operator regarding average cost of capital for all NGS owners.[4] The findings of the final report are summarized as follows.

a. Increased Cost of CAP Water

As the largest CAP contractor the Community will be impacted by the increased cost of CAP water more than any other entity in the State. LNB have already been installed at NGS. This means that the Community is already facing increased CAP water costs for environmental mitigation measures at NGS.[5] If SCR were installed at NGS the increase in direct costs for CAP water for the Community alone would increase by $35.4 Million over this same period. If the NGS were shut down the Community's CAP costs would increase by nearly $290 Million.[6]

[2] Attachment 2, November 16, 2011 letter from Edward F. Harvey to Linus Everling.
[3] Attachment 3, February 28, 2012 letter from Edward F. Harvey to Linus Everling.
[4] Attachment 4, March 15, 2012 letter from Edward F. Harvey to Linus Everling [hereinafter Final Report].
[5] Final Report at 27.
[6] *Id.*

Given that the Community's agricultural enterprises operate on small margins large increases in CAP water would jeopardize the viability of the Community's irrigated agriculture. Loss of Community cropland would result in loss of Community member employment, personal income and hundreds of millions of dollars of Federal investment into the Community's irrigation infrastructure.

b. The Revenue to the Lower Colorado River Basin Development Fund will be Substantially Reduced by the Increased Cost of SCR

Revenue from the sale of excess NGS power is to be used to supplement the Development Fund. A determination by EPA to impose SCR as the BART would substantially increase the cost of excess NGS power, essentially eating away any potential profit from such sales, thereby eroding over $60 Million of estimated revenues that the Community and other CAP settling tribes counted on to enable the Development Fund to subsidize CAP water delivery at least through 2044.[7] Not only does this impact the Community's settlement, the loss of the revenue from the sale of excess NGS power threatens the continued viability of all current Indian water rights settlements in Arizona, and jeopardizes the ability of the United States to settle with other Tribes in on-going water rights settlement negotiations. If the NGS was shutdown Harvey Economics estimated that reduce revenues to the Development Fund from the sale of surplus NGS power would be nearly $500 Million.[8]

c. Total impact to the Community.

Should the cost of emissions controls at NGS render CAP water unaffordable, the Community's water rights would be significantly diminished and the Community would suffer significant economic hardship. For example, if SCR is installed at NGS without a mitigation plan Harvey Economics estimates that the total monetary loss to the Community through 2044 would be over $757 Million.[9] If the NGS shut down total monetary loss would be over $2 Billion.[10]

Such monetary loss would be comparable to the original wrongs done to the Community when non-Indian farmers upstream on the Gila River illegally diverted the flows of the River to the point that it stopped running. The uniqueness of NGS dictates that any EPA rulemaking be coupled with a mitigation plan to ensure that the economies of Arizona tribes are not undermined.

2. NREL Study

Although the NREL study did show substantial increase to CAP water costs it underestimated the impact of the proposed BART implementation scenarios on the Development Fund and made some assumptions that were very different than in the Harvey Economic Study.

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[7] *Id*.
[8] *Id.*
[9] *Id*.
[10] *Id.*

The scenarios adopted for the NREL report mostly overlap with the Harvey Economic study. NREL included scenarios of SNCR, SCR, SCR plus Baghouses, and NGS closure in various chapters of the report. NREL did not include a LnB alternative, which Harvey Economics did.

For example, SNCR capital costs and operating cost assumptions in the NREL report are substantially different than in the Harvey Economics study. NREL assumes capital costs of about $7 Million, whereas Harvey Economics assumes capital costs of about $20 Million. Further, Harvey Economics' Operation & Maintenance costs are also $8.4 Million per year versus $4.3 Million per year, under the NREL report. Whereas the NREL report data sources were not apparent; Harvey Economic obtained its SNCR information from the plant operator, SRP.

Capital and operating cost assumptions for SCR, under the NREL report, are almost exactly the same as those in the Harvey Economic study. Both costs were drawn from the Sargent and Lundy study. However, NREL provided a range of costs for SCR, including both the National Park Service estimates of capital and operating costs and the figures from the Sargent and Lundy reports.

The largest discrepancy was the NREL's estimated impacts on the Development Fund. Because the impacts on the Development Fund were estimated improperly, the important, negative effects on the Community and the other CAP settling tribes from reduced monies into the Development fund were missed.

This shortcoming is explained by the incorrect assumption in the NREL report related to the relationship between the cost of NGS power generation and the price of NGS surplus power. NREL assumes the cost and price which existed at the time of their study would continue over the long term. In fact, costs of NGS power have recently been high due in part to spiking coal prices (nearly double nationwide since 2000) , and a depressed market price for power due to economic conditions, among other factors.

For example, the NREL impact estimates on the Development Fund assume that the current NGS surplus power sales price will stay at current levels. The current market ranges between $19 per megawatt-hour (MWH) off-peak to $35MWH on-peak. This is compared with the market price five or so years ago when power was selling for $40 - $45 for MWH power off-peak, $80 per MWH on-peak. Because the NREL study fixed in place the cost and price of NGS surplus power, the negative effects of the BART scenarios on the Development fund are not apparent. However, projecting even a return to more normal market conditions, much less power price escalation over the long term, would reveal the diminished revenues to the Development Fund from the proposed BART scenarios.

Why is this important to the Community and the other CAP Indian tribes? A primary purpose of the Development Fund is to pay the tribal portion of CAP fixed operations, maintenance and replacement costs for CAP water. If the Development Fund cannot pay those obligations, then the Community and other CAP settling tribes would be obligated to do so, which would result in a tripling of CAP water costs at current rates. Such an increase would render CAP water use by the Community and other tribes to be infeasible.

3. United States Recognition that NGS is Unique

In its meetings with both DOI and EPA the Community was encouraged that that there was a recognition that the NGS facility is unique due to the Bureau of Reclamation's partial ownership of the facility, and the dual purposes to provide economic development opportunities to the Navajo Nation and Hopi Tribe, and provide energy to deliver CAP water to central Arizona for use by tribes and other non-Indian water users. Federal officials also acknowledged that because of NGS' unique nature BART implementation would require a creative thinking so as to minimize the negative economic impact on tribes.

In February Administrator Jackson sent letters to Secretary Chu and Secretary Salazar asking for agency collaboration to work toward a clean energy future with respect to NGS and CAP tribes The Community applauds this suggestion for two reasons. First, it is an acknowledgement that EPA's BART determination at NGS requires a pragmatic approach because of the Federal trust responsibility to tribes. Second, the Community believes that over time the source of the Development Fund needs to be separated from NGS and NGS as a power source for delivery of CAP needs to be minimized because the Federal government has a conflict with respect to its trust responsibility to tribes affected by NGS. On one hand, the United States needs to support the Navajo Nation in increasing the coal and lease revenue at NGS. This benefits the Navajo Nation but increases the price of CAP energy, which the United States has an interest in keeping low for CAP settling tribes.

This inherent conflict can be mitigated if CAP energy and the source of Development Funds are decoupled from NGS over a long period of time. Further, the Community believes that alternative energy sources should be cleaner in order to avoid future negative impacts of energy regulation, and that CAP tribes should have more direct involvement in the source of subsidies that may be necessary to mitigate the impact of BART.

To our knowledge, the meeting suggested by Administrator Jackson has not yet come to pass. The Community urges these agencies to work more actively to provide a solution. To assist them in this effort, the Community has provided all three agencies with its own thoughts on how to mitigate the negative impacts of BART.

4. Community Proposed Solution

The Community has provided to EPA, DOI and DOE a preliminary proposal for the development of a solar facility located on the Gila River Indian Reservation (Reservation), the revenues from which would be used to offset the impacts caused to CAP settling tribes due to increases in the cost of CAP water that are over and above reasonable expectation of baseline increases in the CAP energy costs. The facility would be located on the Community's Reservation, but the revenues would be used to reduce the CAP energy charges for all CAP settling tribes using their CAP entitlements under congressionally approved water settlements.

The proposed facility would be expected to produce at least 20MW of solar power a year. The size of the facility would increase if the agreed upon impact and benefits from early transition to renewable energy-based subsidies are deemed sufficiently large to justify them.

The Community has identified two locations on Reservation that could serve easily as the site for such a facility. The Community has undertaken, with others, a preliminary feasibility analysis of the proposed site, including the cost and engineering work necessary for inter connecting the site to the SRP network.

All net revenues from the facility would be deposited in a special account dedicated to payment of the CAP Energy Charges actually charged to CAP settling tribes during any given year. The account would be held by a suitable entity for purposes of distribution of these net revenues annually. Some of the benefits of such a proposal:

- Support from CAP Settling Tribes for an agreement on BART at an appropriate level.
- Acceleration of the transition from a coal-based subsidy to a renewable source of subsidy.
- Combining the interests of tribes in the generation of a subsidy with the interests of the intended beneficiaries of that subsidy, avoiding the conflict of trust responsibilities that currently exist at NGS.

The Community provided this proposal in an effort to be part of the solution. We are open to other viable solutions as well and believe that any proposed BART will need to include a mitigation plan that all stakeholders can support.

Conclusion

Once again, the Community appreciates the Subcommittee's continued oversight of this critical issue. The timing of this hearing is critical as the EPA moves toward the preliminary BART determination in the coming weeks.